



TC08078

PROCEDURE – strike out application under rule 8(8) Tribunal Procedure Rules for want of jurisdiction – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/202020/03141

BETWEEN

RICHARD COCHRANE

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE AMANDA BROWN QC

The Tribunal determined the application on 4 April 2021 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 with the consent of the parties. A hearing was not held because the matter was capable of being determined on the papers, both parties had made their submissions in writing. The documents to which I was referred were contained in a bundle of 120 pages prepared on behalf of the Appellant and served on 1 February 2021.

DECISION

INTRODUCTION

1. This is an application by HM Revenue & Customs (“**HMRC**”) for the strike out an appeal notified to the Tribunal by Richard Cochrane (“**the Appellant**”) on 28 August 2020 in respect of a closure notice issued by HMRC on 12 February 2020.

BACKGROUND FACTS

2. On 26 July 2004 the Appellant submitted his self-assessment tax return for the year to 5 April 2004. In that year, by reference to the employment pages the Appellant had paid tax at source in the sum of £427,760.40. Tax was also paid at source on taxed bank income of £449.81. Also included in the return in box 15.8 was a claim to “post-cessation expenses, pre-incorporation losses bough forward and losses on relevant discounted securities” to the value of £1,052,800. The explanation given in the white space provided: “On 7/11/2003 I purchased UK Treasury Principal Gilt Strip 7/12/2003 nominal amount £1,172,697 SEDOL 0219055, for £1,170,000. ON 18/11/2003 I granted an option to the Richard Cochrane IIP Settlement 2003 of which I am settlor and life tenant. I understand that the trustees sold this option to Investech Bank (UK) Ltd who subsequently exercised the option by paying £117,200 to me. As a result of this exercise of the option I have suffered an income tax loss of £1,052,800. It is considered this loss is allowable under para 14A Schedule 12 to Finance Act 1996 an [sic] is reflected at box 18.8 of the attached return.”

3. The Appellant undertook his own calculation of tax chargeable and, as per box 18.3 calculated he was due a tax repayment of £415,079.16.

4. At box 20.1 and in response to the question “Have you already had any 2003-04 tax refunded or set off by your Inland Revenue Office ...?” he responded “yes” and disclosed the repayment as £20,000.

5. The declaration required that the return is correct to the best of the Appellant’s knowledge and belief was completed.

6. On 16 August 2004 HMRC notified the Appellant that they intended opening an enquiry into the 2003-04 self-assessment return. The notice of enquiry stated “My enquiry is into your claim to loss relief at Box 15.8 of the return. I will not be asking about other areas of your return unless your reply, or any further information I see, contains something I need to check.”

7. Over the period of 14 years the enquiry remained open but with little or no communication between the parties. However, on 13 April 2018 HMRC wrote to the Appellant inviting the Appellant to settle the tax position on what had been established to be in e-ineffective tax avoidance scheme. The Appellant was notified that he could either settle or request a closure notice. The letter advised: “I calculate that the additional tax arising from your use of the scheme is £421,120.00. We have retained the 2003/4 overpayment of £395,469 so the balance of tax now payable is £25,651 and interest ...”

8. Although it has not been possible for the Tribunal to reconcile precisely the £395,469 in substance it would appear to be the difference between the claimed loss and the sums paid by the Appellant at source less the £20,000 returned as having been repaid and declared in box 20.1.

9. In response to HMRC’s invitation the Appellant responded stating: “I have reviewed considerable amounts of information in an attempt to reconcile the entry within your computations described as ‘Tax already refunded in the year’ in the sum of £20,000. I’m afraid that I have not been able to identify any repayment of 2003/4 income tax overpaid to

Mr Cochrane. Please can you send me details of this entry, including the dates, amounts involved and the manner in which they have been repaid.”

10. In a conversation between an HMRC officer and the Appellant’s representative on 12 September 2018 HMRC indicated that the amount refunded may have arisen from a pension scheme or investment income and would have been in the form of a cheque. The representative questioned this conclusion by reference to the Appellant’s circumstances but agreed to investigate further. The officer also agreed to review HMRC records.

11. By letter dated 1 March 2019 HMRC confirmed that the officer had been trying to trace record of the repayment but had been unable to find anything. The letter noted “of course this does not mean that a repayment was not made, simply that no records for it can now be traced.” The letter goes on to reference that the repayment had been included in the return which the Appellant had signed as accurate. It had also been included in the calculation of overpayment attached as a schedule to the return. The Appellant was again invited to settle his tax position.

12. On 26 April 2019 the Appellant wrote to HMRC indicating that as neither party had been able to identify the payment or receipt of £20,000 it was reasonable to conclude that the sum had not in fact been repaid and expressing concern that HMRC proposed to collect as due a sum which assumed that the £20,000 had been repaid. The Appellant submitted and amended 2003-4 tax return removing the box 20.1 entry and making a new declaration. The Appellant made clear in the letter that he wished to settle the gilt strip tax avoidance errors.

13. HMRC did not accept the amendment to the return and on 12 February 2020 HMRC issued a closure notice to the Appellant.

14. The closure notice identified two matters: 1) gilt strip losses claimed at Box 15.8 of the return and 2) taxed interest returned at boxes 10.2, 10.3 and 10.4. The losses in relation to 1) were disallowed because there was no loss within paragraph 14A(1) and (3) Schedule 13 to Finance Act 1996 and/or for other reasons set out in an accompanying letter. Matter 2) merely determined the tax paid by reference to final rather than estimated figures. The closure notice then reads:

“How this affects your Self Assessment tax return

This final closure notice amends your Self Assessment tax return based on my calculations.

Before this amendment your tax return showed tax overpaid of:	£395,469.00
After this amendment your tax return shows tax due of:	£25,795.79
The difference between these amounts is:	£421,264.79

The difference of £421,264.79 is the additional tax for the matter completed by this final closure notice.

...

What you need to pay and when

...

The £24,096.99 shown above includes the tax that you need to pay for the matters completed by this final closure notice. That amount is £14,391.42. This is after we have taken off anything you have already paid towards it, and any other available credits on your statement.

The amount due takes account of the £20,000 which you returned as having been already repaid.”

15. The Appellant appealed the closure notice to HMRC by letter dated 2 March 2020. The stated matter appealed is “the adjustment to tax payable in the sum of £421,264.79. I believe the correct amount of that I should pay for fiscal year 2003/04 is £5,795.79. The Appellant applied for £20,000 to be stood over. The grounds are stated to be that:

“HMRC’s computation of revised tax payable for the year fails to remove the sum of £20,000 income taxation said to have already been paid to me for the year.

During the course of our correspondence on fiscal year 2003/04 both I and HMRC having comprehensively reviewed our records to confirm that the amount of £20,000 was repaid during the year. All reviews undertaken have confirmed that I was not repaid the sum.

Not only are there no records of the repayment but my circumstances as a taxpayer do not support the conclusion that it could have taken place. Again HMRC and I have discussed the circumstances in which income tax could be repaid during a financial year and none fit mine.”

16. In their view of the matter letter dated 18 March 2020 HMRC confirmed that neither HMRC nor the Appellant could trace the repayment but as the repayment had been included on a signed return the repayment had been so adjusted in the amendment by closure notice.

17. HMRC’s review decision dated 29 July 2020 identifies the matter under appeal as the closure notice and revenue amendment and the point at issue whether there was a repayment of £20,000 paid in the tax year 2003/04. The conclusion is noted as:

“The enquiry and its conclusion are not ins dispute, other than as to whether a £20,000 refund was received in the tax year 2003/04. You have been unable to provide a reason as to why you included this claim on your return nor why it was referenced in the supplementary attachment if you did not receive it. The Closure Notice and Revenue Amendment for tax year 2003/04 is upheld in the additional tax amount of £421,264.79.”

18. The Appeal was notified to the Tribunal on 28 August 2020 invites the Tribunal to vary the amendment in the closure notice to reflect that £20,000 was not repaid to the Appellant and as such the amount payable on the assessment (after credit for tax paid) be reduced accordingly.

19. On 19 October 2020 HMRC applied for the appeal to be struck out on the basis that the Tribunal has no jurisdiction to hear the appeal (see below for a fuller articulation of the basis of strike out).

RELEVANT LEGISLATION

Taxes Management Act 1970 (“TMA”)

20. Section 8

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax ... for a year of assessment, and the amount payable by him by way of income tax for that year he may be required by a notice given to him by an officer of the board – (a) to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice ...

(1AA) For the purposes of subsection 1 above – ... (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source ...

21. Section 9A

(1) An officer of the Board may enquire into a return under section 8 ... of this Act if he gives notice of his intention to do so ...

(4) An enquiry extends to – (a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return ...

22. Section 28A

(1) This section applies in relation to an enquiry under section 9A(1) of this Act

(2) A ... final closure notice must state the officer's conclusions and ... (b) make the amendments of the return required to give effect to his conclusions.

23. Section 31

(1) An appeal may be bought against ... (b) any conclusion stated, or amendment made by a closure notice under section 28A ...

Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“FTT Rules”)

24. Rule 8

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal – (a) does not have jurisdiction in relation to the proceedings or part of them ...

(3) The Tribunal may strike out the whole or part of the proceedings of the Tribunal – ... (c) the Tribunal considers there is no reasonable prospects of the appellant's case, or part of it, succeeding ...

HMRC'S APPLICATION

25. HMRC invites the Tribunal to strike out the Appellant's appeal under rule 8(2)(a).

26. HMRC correctly note that the Tribunal is a creature of statutes and its powers are limited to those granted to in under the terms of the Tribunal Courts and Enforcement Act 2007 and the various taxing statutes.

27. It is HMRC's contention that the response to Box 20.1 on the self-assessment tax return is a matter outside the tax return and accordingly the decision to adjust the amount payable on the amended return by reference to the repayment disclosed in Box 20.1 is not a matter falling within the scope of HMRC's section 9A(1) TMA enquiry and outside the provisions of section 8(1AA) TMA.

28. HMRC contend that the response to Box 20.1 goes to how the income tax calculated and payable for the tax year is to be collected. In this regard HMRC rely on the Supreme Court judgment in *Cotter v HM Revenue & Customs* [2013] UKSC 69 in which Lord Hodge considered that in the context of sections 8(1) and 9A TMA “return” references only those parts of the return establishing the amounts in which a person is chargeable to income tax and the amount which is therefore payable by way of income tax. In HMRC's submission any sums declared in Box 20.1 simply net off the amount otherwise payable and are not “in the return” and cannot therefore be part of the enquiry or the closure notice such that no appeal lies to the Tribunal.

APPELLANT'S RESPONSE

29. The Appellant resists the application on three grounds:

(1) The application contradicts HMRC's position as outlined in their conclusion letter and earlier correspondence

(2) The subject matter of the appeal is covered by section 9(4) TMA

(3) The subject of the appeal is covered by the scope of section 28A TMA

30. The first ground is substantively that in all correspondence HMRC have treated the £20,000 as part of the dispute between the parties and within the scope of the enquiry and closure notice. On the face of it this ground appears to found on the administrative actions of HMRC. To the extent that it does it is not a matter which is within the Tribunal's jurisdiction. However, for the reasons set out in the discussion session below, it is the scope of the enquiry, and closure notice amendment as determined by HMRC which determines the jurisdiction of the Tribunal in a matter such as this.

31. The second and third grounds are substantively that as Box 20.1 is contained in the return any dispute as to its effect is within the scope of the enquiry and the closure notice. The Appellant refers to the Court of Appeal judgment in *Brian Knibbs and others v HM Revenue and Customs* [2019] EWCA Civ 1716 as confirming that the FTT represents the statutory means of challenge to a closure notice and any other means represents an abuse of process.

DISCUSSION

32. Dealing first with the authorities to which the parties referred:

(1) *Cotter* concerned a taxpayer who had not elected to calculate his own tax for the tax year 2007/08. The taxpayer asserted that losses incurred in the tax year 2008/09 should be carried back to 2007/08 and, on that basis, submitted an amended return for the 2007/08 year. HMRC refused to adjust 2007/08 on the basis of the amended return and sought to enforce the tax calculated as due and payable on the original return. By reference to the various enquiry powers available to HMRC the Supreme Court determined that the enquiry into the losses sought to be carried back were proper to 2008/09 with the consequence that the tax chargeable and payable for 2007/08 was enforceable through the County/High Courts.

(2) *Knibbs* also concerned an attempt to carry back losses. In the circumstances of that case, and applying the judgment in *Cotter*, the Court of Appeal determined that HMRC's powers to enquire into the losses was via a section 9A TMA enquiry into the year in which the losses were incurred and a failure to enquire in respect of the earlier year did not make the carry back enforceable by way of a CPR Part 7 claim in respect of the earlier tax year. The taxpayer's right was to appeal to the FTT against the closure notice for the later year.

33. Those cases are factually more complicated than the present one but essentially affirm the same position: the jurisdiction of the Tribunal is fixed by reference to the closure notices issued.

34. In the present appeal for 2003/04 the Appellant made the return required of him under s8(1) TMA. By that return, and by reference to the gilt strip loss, he calculated, and self assessed, the income tax to which he was chargeable. However, as he had been subject to tax deduction at source of £427,760 (on his employment) and £449 (on his bank interest) he determined that he had overpaid tax for the year in question in the sum £395,469 taking account of the £20,000 he had identified as having been repaid to him in that year which he used to reduce the aggregate deductions at source. This amount was the amount he assessed as (re)payable by way of income tax, in accordance with section 8(1) as interpreted by reference to section 8(1AA) TMA.

35. HMRC opened their enquiry pursuant to section 9A(1) TMA into the gilt strip losses but also identified "I will not be asking about other areas of your return unless your reply, or any further information I see, contains something I need to check". This was a focused

enquiry but did not exclude any area of the return which needed to be checked as a result of, inter alia, the Appellant's replies under the enquiry.

36. During the course of the enquiry, and prior to the issue of the closure notice, the Appellant raised that he considered that the entry in Box 20.1 had been made in error as he could find no evidence that he had received £20,000 by way of repayment nor could he identify a circumstance in which such a repayment would have been justified. These were matters to which HMRC was alive and which arise directly in connection with the enquiry. They were a reply under the enquiry.

37. The relevant terms of the closure notice are set out in paragraph [14] above. It is absolutely clear that the amendment made by HMRC, in consequence of its conclusions as set out, was that the amount of income tax charged to income tax after the gilt strip losses had been denied was £25,795.79. HMRC's calculation within the amendment of the return as set out was referable to the £395,489 calculated by the Appellant and thereby took account of the aggregate income tax deducted at source and the returned repayment in Box 20.1. HMRC determined that the amount payable by way of income tax for the 2003/04 year should reflect that in that year, by reference to the answer to Box 20.1, the Appellant had received a £20,000 income tax repayment.

38. Pursuant to section 31(1) the Tribunal's jurisdiction is in respect of any appeal against the conclusion stated or amendment made in a closure notice.

39. The Appellant contends that the income tax payable following the amendment to the self assessment as set out in the closure notice is overstated. In essence they contend that the aggregate amount deducted at source (£427,760 plus £449) should not be adjusted by reference to the £20,000 declared in Box 20.1 because, they say, it was never received.

40. The Tribunal considers that on the basis of the terms of the amendment as set out in the closure notice the £20,000 has been included in the calculation of that amendment and therefore falls squarely within the scope of the appeal providing the Tribunal with the necessary jurisdiction. There is no sense in which Box 20.1 is outside the return by reference to the amendment made.

41. HMRC did not invite the Tribunal to strike out on the basis of rule 8(3)(c) FTT Rules and on the grounds of no reasonable prospects. This appeal is at a very early stage, HMRC have not provided their statement of case and neither party has prepared and submitted evidence. However, the Tribunal notes that at present the Appellant's case is based on assertion that he was not a taxpayer with a profile which would have justified a repayment of the type that HMRC envisage the £20,000 to have represented and a further assertion that there is no evidence of receipt. These assertions are set against a statutory declaration made on the original return that he had received the refund. If the Appellant wishes to make out its case, at the very least, the Tribunal would expect to see bank account information which evidences that there was no deposit or payment received from HMRC and to make good that pension or investments etc. would not have justified a repayment for the tax year prior to submission of the self assessment return in July 2004. Similarly, however, the Tribunal is astonished that, as regards a tax year which was under enquiry within 5 months of the end of it, HMRC has no record of payments made to the Appellant regarding that year, if indeed a repayment was made.

42. As identified by the Appellant this a dispute as to the facts and circumstances regarding the alleged repayment which will be determined on the evidence. It is, however, a dispute within the jurisdiction of the Tribunal which will, at the appropriate time, assess the evidence of each party and determine the issue.

43. For these reasons HMRC's application for strike out is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**AMANDA BROWN QC
TRIBUNAL JUDGE**

RELEASE DATE: 08 APRIL 2021